UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v. Case No. 8:08-cr-330-T-30TBM

JOHN ROBERT MILLER

UNITED STATES' CONSOLIDATED RESPONSE TO MOTIONS TO HAVE COAST BANK BORROWERS RECOGNIZED AS CRIME VICTIMS PURSUANT TO TITLE 18, UNITED STATES CODE, SECTION 3771 AND RELATED MOTIONS

The United States of America, by and through United States Attorney A. Brian Albritton, hereby files this consolidated response to the Motion To Have Coast Bank Borrowers Recognized As Crime Victims Pursuant To Title 18, United States Code, Section 3771 (Doc. 16), Motion For Disclosure Of Portions Of Defendant's Pre-Sentence Report To Borrowers (Doc. 17), Motion To Have Additional Coast Bank Borrowers Recognized As Crime Victims Pursuant To The Crime Victim's Rights Act (Doc. 19), as well as Motion To Be Considered Crime Victims Pursuant to Title 18, United States Code, Section 3771 (Doc. 27).

FACTS AND PROCEDURAL BACKGROUND

On August 12, 2008, John Robert Miller waived his right to be charged by indictment, (Doc. 2), and the United States filed an information that charged Miller with conspiring to commit wire fraud and, thereby, to deprive Coast Bank of the intangible right to honest services, in violation of 18 U.S.C. §§ 1343 and 1346, and 18 U.S.C. § 371. (Doc. 1). The information alleged that Miller had used his position as President of American Mortgage Link (AML) and Solutions Processing, Inc. (Solutions) to charge the

clients (i.e., individuals who desired to obtain loans from Coast Bank (Coast), the employer of coconspirator Philip William Coon) a brokerage fee that was one percent higher than the company's customary fee and to split the additional fee with Coon.[1] (Doc. 1 ¶¶ 1-16). The information also alleged that Miller had received 25 percent of the additional fee. (Id. ¶¶ 4, 6, 8).

On September 18, 2008, Miller pled guilty pursuant to a written plea agreement. (See Docs. 3, 7, 12). In his plea agreement, Miller acknowledged that the district court must order him to make restitution to "victims" in accordance with 18 U.S.C. § 3663A. (Doc. 3 at 1-2, 9-10). Miller also admitted the facts that would form the basis for his guilty plea. (Doc. 3 at 14-17).

Specifically, Miller admitted that (1) he had been the President of AML, a Florida corporation which had been engaged in the business of originating mortgage loans, and Solutions, a Florida corporation which was not engaged in any business activity (Id. at 14); (2) Miller's coconspirator, Coon, was the Executive Vice-President, Mortgage Lending Department of Coast, and he owed Coast a fiduciary duty to act honestly, faithfully, and in Coast's best interest and to disclose to Coast any personal interest, profit, or kickback that he had derived or expected to derive from any business transaction in the course of his employment (Id. at 14-15); (3) Miller agreed to charge AML's clients (i.e., individuals who desired to obtain loans from Coast) a brokerage fee that was one percent higher than AML's customary fee and to pay Coon 75 percent of

[1] Miller's coconspirator, Coon, was charged separately and pled guilty to an information pursuant to a written plea agreement in United States v. Coon, Case No. 8:08-CR-441-T-17MAP.

the additional fee (Id. at 15); (4) in furtherance of the conspiracy, AML had "charged" AML client Janis Stewart a mortgage brokerage fee amounting to two percent, rather than AML's customary fee of one percent (Id. at 16-17); (5) the fraudulent scheme had given Coon an incentive to deal with AML (Id. at 16); (6) the fraudulent scheme had caused Coast to accumulate a "higher concentration" of loans involving one builder in one geographic area than had been "prudent" (Id.); (7) coconspirator Coon reasonably should have foreseen that Coast might suffer economic harm as a result of the breach of Coon's fiduciary duty (Id.); and (8) Miller transferred to Coon $1,146,462.35 in proceeds from the fraudulent scheme (Id.).

On November 11, 2008, a group of 104 borrowers filed a motion asking this Court to recognize them as "victims" under 18 U.S.C. § 3771. (Doc. 16). Relying primarily on several documents that they characterized as "typical" loan documents, (id. at 1-2 and Exhibits B - D), the borrowers asserted that they had been "directly harmed" by the charged offense because of the "extra point overcharge." (Doc. 16 at 2-4). Based on that assertion, the borrowers argued that they were victims under section 3771 and, thus, should be entitled to restitution. (Id. at 3-4). The borrowers also asserted that Coast was not a victim under section 3771 and, thus, should not be entitled to restitution because: (1) Coast's board of directors had been aware that Coast had been accumulating a "higher concentration of loans" involving one builder in one geographic area; (2) even if Coast had been harmed by the fraudulent scheme, Coast cannot receive any restitution because it had been acquired by another bank in December 2007 following public disclosure of the "skimming" scheme and the ensuing civil lawsuits; (3) Coast or Coast's successor had recouped much of the loan proceeds

through payments by borrowers, workouts, and various collection efforts; and (4) if the district court were to order restitution to Coast's successor, then Coast's successor would be collecting the same money twice. (Doc. 16 at 4).

The same 104 borrowers also filed a motion for disclosure of portions of Miller's Presentence Investigation Report ("PSR"). (Doc. 17). Specifically, the borrowers requested disclosure of the portions of the PSR that addressed the victims and restitution. Id.

On November 20, 2008, eight additional borrowers filed a motion seeking to join in the prior motion (Doc. 16) in which 104 borrowers had asked this Court to recognize them as victims. (Doc. 19).

In response to the borrowers' pleadings, defendant Miller filed a Notice of Filing of Order Entered in United States of America vs. Philip William Coon (Doc. 18) as well as a Response to Motion to Have Additional Coast Bank Borrowers Recognized as Crime Victims Pursuant to Title 18, United States Code, Section 3771 (Doc. 20). Borrowers' counsel then filed a Reply to Defendant Miller's Response. (Doc. 21).

Counsel representing the same borrowers filed similar pleadings in the Coon case, some which have been denied by the Honorable District Judge Elizabeth A. Kovachevich. (See Doc. 18 at 3-5.) To ensure that this Court has access to all the relevant facts involving both related cases and for the Court's convenience, attached hereto at Exhibit 1 is the United States' response filed December 3, 2008, in the Eleventh Circuit Court Appeals, to the borrowers' petition for a writ of mandamus in In Re: Janis W. Stewart and Other Borrower-Crime Victims, Case No. 08-16753-G. This response contains a complete recitation of the facts and procedural background in the

Coon case. The mandamus petition, as a well as a jurisdictional question, are currently pending in the Eleventh Circuit Court of Appeals. Although section 3771 provides that the "court of appeals shall take up and decide such application forthwith within 72 hour after the petition has been filed, " the Eleventh Circuit has granted the borrowers' motion waiving the 72-hour requirement for a decision up to two weeks. (Coon Case at Doc. 28.)

MEMORANDUM OF LAW

The borrowers have petitioned this Court for recognition under the Crime Victims' Rights Act (CVRA), seeking restitution as a result of Miller's guilty plea. (Docs. 16, 19). For the reasons discussed below, the borrowers are not entitled to the relief they seek.

Crime Victims' Rights Act

The CVRA, 18 U.S.C. § 3771, signed into law on October 30, 2004, seeks to provide "crime victims" direct standing to vindicate their procedural and substantive rights in criminal cases. United States v. Sharp, 463 F. Supp. 2d 556, 560 (E.D.VA 2006). The Act specifically enumerates eight victim rights. 18 U.S.C. § 3771(a). "The statute charges the district court with ensuring that the victims of crime are afforded these rights, and the court must state the reasons for any decision denying relief sought under the provisions of the CVRA on the record." United States v. Rubin, 558 F.Supp.2d 411, 417 (E.D.N.Y. 2008). Prosecutors and other agents of the Department of Justice are required to "make their best efforts to see that crime victims are notified of, and accorded" their CVRA rights. 18 U.S.C. § 3771(c)(1).

The CVRA defines a "crime victim" as "a person directly and proximately harmed as a result of the commission of a Federal offense . . . ." 18 U.S.C. § 3771(e).[2] "Thus, a person must be directly harmed as a result of the offense and the harm must be proximate to the crime." United States v. Hunter, 2008 WL 53125 at *2 (D. Utah, Jan. 3, 2008). Although a floor debate noted that the definition of "victim" in the CVRA was "intentionally broad," see 150 Cong. Rec. S 10910, 10912 (daily ed. Oct. 9, 2004), "at least one court has noted that the full Congress passed the CVRA knowing that the Supreme Court has interpreted similar language in prior victims' rights acts not to refer to uncharged conduct." Hunter at *2 (citing United States v. Turner, 367 F.Supp.2d 319, 326 (E.D.N.Y. 2005) (recognizing that the House report on the CVRA noted that 18 U.S.C. § 3771(a)(6) "makes no change to the law with respect to victims' ability to get restitution.")).

If an individual feels he should be recognized as a "crime victim," the CVRA provides that he or his lawful representative may assert the CVRA rights in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred. 18 U.S.C. § 3371(d)(1) and (3). The district court "shall" take up and decide any motion asserting a victim's rights "forthwith." Id. at (d)(3). If the district court denies the relief sought, the

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[2] The Victim and Witness Protection Act of 1982 (VWPA), 18 U.S.C. § 3663, and the Mandatory Victim Restitution Act of 1986 (MVRA), 18 U.S.C. § 3663A, define a "victim" as "a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered . . . ." 18 U.S.C. §§ 3663(a)(2) and 3663A(a)(2); see also Federal Rules of Criminal Procedure 1(b)(11) ("'Victim' means a 'crime victim' as defined in 18 U.S.C. § 3771(e)."), amended Apr. 23, 2008, eff. Dec. 1, 2008.

movant may petition the court of appeals for a writ of mandamus. Id. This avenue of potential relief notwithstanding:

> . . . there is absolutely no suggestion in the statutory language that victims have a right independent of the government to prosecute a crime, set strategy, or object to or appeal pretrial or in limine orders entered by the Court whether they be upon consent of or over the objection of the government. Quite to the contrary, the statute itself provides that "[n]othing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction."

Rubin, 558 F.Supp.2d at 418 (quoting 18 U.S.C. § 3771(d)(6)). "In short, the CVRA, for the most part, gives victims a voice, not a veto." Id.

The United States' Actions In Accordance With 18 U.S.C. § 3771(c)(1)

The rights specified in section 3771(a) include the "right to reasonable, accurate, and timely notice of any public court proceeding," the "right to be reasonably heard at any public proceeding in the district court involving . . . plea," and the "reasonable right to confer with the attorney for the Government in the case . . . ." 18 U.S.C. § 3771(a)(2), (4), and (5). The United States is well aware of those obligations and takes them seriously. As demonstrated below, the United States has complied with those obligations in this case.

As discussed above, the facts of this case became a matter of public record with the filing of the information, waiver of indictment, and plea agreement in United States v. Miller, on August 12 and 13, 2008. Because the United States did not consider the borrowers to be victims in the case, the United States had had no contact with the borrowers as of the filing of the information and plea agreement.

On August 29, 2008, the United States received its first contact on behalf of a borrower. Specifically, the United States' Victim Witness Program Manager received a

telephone call from Jennifer Miller Veal, of the Carrero Law Group, on behalf of homeowners being sued by Coast for foreclosure. Ms. Miller Veal scoffed at the notion that Coast was the victim in the case and articulated her theory of why the homeowners were victims. The Program Manager related the information to the Assistant United States Attorneys (AUSAs) handling the prosecution, and the AUSAs initiated an investigation of these new claims.

On or about September 3, 2008, AUSA Robert A. Mosakowski was contacted by a borrower. On September 5, 2008, AUSA Mosakowski had a telephone conversation with the borrower, who stated that he had civil counsel (attorney Alan Tannenbaum), that he had learned of the government's case against defendant Miller, that he was contemplating firing his civil attorney and collecting restitution in the United States' criminal case instead, and that he wanted to know if such a plan could work. AUSA Mosakowski suggested to the borrower that he not sleep on his rights, and he offered to speak with the borrower's counsel if such counsel wished to discuss the case.

On September 18, 2008, defendant Miller pleaded guilty before the Honorable Magistrate Judge Thomas B. McCoun, III. On October 9, 2008, this Court accepted defendant Miller's guilty plea, adjudged him guilty of the offense charged, and scheduled his sentencing hearing for January 13, 2009.

On October 15, 2008, the United States filed an information and waiver of indictment to open Coon's case. On October 17, 2008, defendant Coon's plea agreement was filed, and his guilty plea hearing was scheduled for November 5, 2008.

Meanwhile, on October 20, 2008, the undersigned placed telephone calls to both Jennifer Miller Veal, of the Carrero Law Group, and Alan Tannenbaum, of Levin

Tannenbaum. On the same date, the undersigned spoke with Ms. Miller Veal about the Carrero Law Group's theory concerning the homeowners' status as victims. The undersigned told Ms. Miller Veal that although the United States did not view the Carrero Law Group's clients as victims, the United States was more than willing to notify said clients of upcoming proceedings by inputting counsel for said clients into the Victim Notification System ("VNS"). In response, Ms. Miller Veal agreed to send the undersigned a complete list of all persons whom the Carrero Law Group considers victims and for whom attorney Thomas Carrero would serve as the United States' point of contact. The undersigned confirmed this agreement in an email to lawyer Thomas Carrero.

On October 23, 2008, the undersigned had a comparable telephone conversation with attorney Tannenbaum. Per the conversation, the undersigned sent an email to attorney Tannenbaum, accepting his offer to email the prosecutor a copy of the transcript of Jesse Battle's sworn statement in a Bankruptcy Court proceeding, and confirming that the undersigned was continuing to explore the victim notification issue and that she would again contact attorney Tannenbaum. On or about the same date, the undersigned provided attorney Tannenbaum with the name and telephone number of the United States Probation Officer responsible for preparing the PSRs for defendants Miller and Coon, so that attorney Tannenbaum could ensure that his clients were referenced in the PSRs, if appropriate.

Also on October 23, 2008, the United States, through its Victim Witness Program Manager, initiated communications with a responsible official at the United States Department of Justice, described its handling of the prosecution and the contacts from

counsel on behalf of borrowers, and requested guidance. The United States has continued to consult with Main Justice throughout the course of proceedings involving the claims raised by borrowers.

On October 27, 2008, attorney Tannenbaum sent the undersigned a lengthy email detailing his theories as to why his clients should be deemed victims. On October 30, 2008, the undersigned sent attorney Tannenbaum a letter, which stated, in pertinent part:

> I am writing to follow-up on our various communications concerning the alleged status of your clients as victims in the above-captioned [Coon and Miller] cases. This is the first time I have encountered persons claiming to be victims of a criminal case(s) wherein the government does not recognize such persons as victims of the particular offense conduct charged. Accordingly, I have looked into the question further.
>
> My preliminary research suggests that, under the circumstances, the Court should determine whether your clients are to be recognized as victims, within the meaning of the Crime Victims Rights Act (CVRA), in the above-captioned cases. See, e.g., United States v. Hunter, 2008 WL 53125 (D. Utah); United States v. Sharp, 463 F. Supp. 2d 556 (E.D.Va. 2006). I would encourage you to review the relevant legal authority on this issue and, if appropriate, file a motion asking the Court to make the determination.
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> In anticipation of such a motion, the government will file a Notice of Related Cases, pursuant to Local Rule 1.04(b), to alert the Court to the fact that the cases are now assigned to two different judges. Then the Court can decide whether one or both judges will make the requested determination.
>
> As promised, the government has added you to our Victim Notification System (VNS) so that you receive the required notices of important proceedings in the cases. You have agreed to act as the sole point of contact for such purposes for your clients.

On October 30, 2008, the undersigned sent nearly identical letters to attorney Thomas Carrero and a third attorney, Tony Livingston.

Also on October 30, 2008, the first VNS-generated letters in the Coon and Miller cases were sent to attorneys Tannenbaum and Carrero. The letter concerning the Coon case noted that defendant Coon "has been scheduled for his or her first appearance in Court on November 5, 2008, at 10:00 AM at CTRM 11B before Judge MARK A. PIZZO." To ensure that these attorneys received timely notice of the upcoming plea hearing, the United States' Victim Witness Program Manager also emailed the attorneys on October 31, 2008. The email stated:

> Gentlemen, this email is to advise you that a change of plea hearing is scheduled for Mr. Coon on November 5, 2008, at 10:00 a.m. before Magistrate Mark Pizzo in Courtroom 11B at the Federal District Courthouse, Tampa, Florida. Please contact me via e-mail or telephone (813-274-6079) if you have any questions.

On October 31, 2008, as promised, the United States filed a Notice of Related Cases in both the Coon and the Miller cases.

On November 5, 2008, attorney Tannenbaum appeared at defendant Coon's guilty plea hearing. During the hearing, AUSA Mosakowski described in general terms the United States' multiple contacts with attorney Tannenbaum:

> The Government's position is these people are not victims of the crimes that we have charged in this case but we invited Mr. Tannenbaum and I think there is another attorney out there, to file motions with the Court if they wish to. To my knowledge I haven't one but I haven't checked my e-mails this morning. (Coon Doc. 13 at 27-28)
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> . . .
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> . . . Your Honor, the Government's position is that Coast Bank is the victim in this case because they were deprived of their right to honest services and they have a fiduciary duty between the bank and Mr. Coon. Mr. Tannenbaum has stated in the past to our office – we've had several discussions with Ms. Bedke particularly and several discussions and written communications with Mr. Tannenbaum. He indicates that he believes that there is a fiduciary duty between Mr. Coon and every borrower from the bank. The Government, as we read the law concerning the right to honest services, does not read the Statute as

> broadly. Based on that, Your Honor, we do not – the Government's position is they are not victims. We've furnished him with the information in several cases and invited him to file a motion with the Court. In fact, we – well, that's what we did, but until that has been determined and even if there is a hearing concerning that, the Government's position is on the offense of conviction his clients are not victims. (Coon Doc. 13 at 31-32)

Thereafter, attorney Tannenbaum filed the motions and other pleadings referenced above. In addition, the Carrero Law Group, by attorney George R. Baise, Jr., filed the motion referenced above.

The Borrowers Do Not Meet The CVRA Definition Of "Crime Victim."

Courts that have reviewed motions filed by individuals seeking to assert CVRA rights have held movants to a strict standard of establishing "direct and proximate harm" to obtain relief. In Sharp, the former domestic partner of a marijuana user sought to be recognized as a victim so that she could present a victim impact statement at the defendant's sentencing hearing. Sharp, 463 F.Supp.2d at 558. The defendant pled guilty to conspiracy to possess with intent to distribute marijuana, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(D) and 846. Id. The purported victim, Elizabeth Nowicki, claimed that the defendant's sale of marijuana to her former boyfriend caused the boyfriend to become physically, mentally and emotionally abusive to her. Id.

After conducting a lengthy analysis of the CVRA, VWPA, and MVRA, the district court concluded that "[t]here simply [was] no verifiable evidence from which this Court may conclude that the Defendant's participation in the drug conspiracy created the circumstances which led to Nowicki's alleged injuries." Id. at 565. The court determined that Nowicki did not establish "direct and proximate" harm, stating "[f]oreseeability is at the heart of proximate harm; the closer the relationship between

the actions of the defendant and the harm sustained, the more likely that proximate harm exists." Id. (internal citation omitted). Although Nowicki may have been a victim of her boyfriend's violent ways, she failed to demonstrate "the nexus between the Defendant's act of selling drugs and her former boyfriend's subsequent act of abusing her." Id. at 566. "In essence, to qualify as a victim, Nowicki would need to show a more direct link -- or more specifically, a 'direct and proximate' causal link -- between the Defendant's act of selling marijuana to her boyfriend, and her boyfriend's subsequent abusive behavior against her." Id.

More recently, in United States v. Hunter, 2008 WL 53125 (D. Utah 2008), the movants, Sue and Ken Antrobus, sought to be recognized as crime victim representatives on behalf of their daughter, Vanessa Quinn, who was killed by Sulejuman Talovic during a shooting rampage at a Salt Lake City shopping center. Hunter, 2008 WL 53125 at *1. Talovic used two weapons during the rampage, including a handgun he purchased from defendant MacKenzie Hunter. Hunter was charged with and pled guilty to unlawfully selling the firearm to Talovic, who Hunter believed to be a minor at the time of the purchase. Id. In conducting its analysis, the district court noted that a determination of proximate harm is necessarily a fact-specific inquiry. Id. at *4. Relying on and agreeing with Sharp, the district court concluded that although Quinn and the Antrobuses were clearly victims of a tragic crime, they were not victims, as defined by the CVRA, of Hunter's offense of selling a firearm to a minor. Id. at *6.[3]

[3] The Antrobuses' petition for a writ of mandamus seeking review of the district court's decision was denied. See In re: Antrobus, 519 F.3d 1123 (10th Cir. 2008). The Antrobuses' attempt to appeal the district court's application of the CVRA was also denied. United States v. Hunter, 2008 WL 5062140 (10th Cir., Dec. 2, 2008).

Similarly, the Coast Bank borrowers were not directly and proximately harmed by defendant Miller's criminal conduct in this case. Instead, Coast was a victim of the criminal conduct of both defendants Miller and Coon because their conspiracy deprived Coast of its intangible right to the honest services of its employee, Coon. Examination of the program that gave rise to the borrowers' loans and the documents prepared in connection with such program makes clear that the borrowers are not victims within the meaning of the CVRA.

Coast, AML, Construction Compliance, Inc. ("CCI"), and others participated in a program that offered investors the opportunity to purchase pre-construction homes on a fixed purchase price contract basis. The program offered investors their choice of a limited number of models to be constructed on lots located in the Sarasota/Charlotte County areas and neighboring areas. The fixed purchase prices of said models were set at 90 percent of the estimated appraised value. See Excerpt of Sworn Statement of Jesse B. Battle, III, taken in 341 Meeting in In Re: Construction Compliance Inc., et al., United States Bankruptcy Court, Middle District of Florida, Case No. 8:07–02650-CPM, attached hereto as Exhibit 2, at 35, lines 12 - 15; Letter dated May 4, 2005 and addressed to Mr. Luis Ferrer, attached hereto as Exhibit 3, at 1. Qualified investors[4] who purchased these pre-construction homes did so with no money down, and they were limited to purchasing no more than two of these pre-construction homes at any

[4] The qualifying criteria included a credit score of 680 or higher, verified assets of $25,000 per pre-construction home purchased, and verified employment or self-employment for the past two years. Applicants for such loans were permitted to state their income. Borrowers were permitted a maximum of two loans per household at any given time, with only one loan to close in any given calendar month. See Exhibit 3, at 2.

one time, no more than one per calendar month. See Exhibit 3 at 2 and 3. Coast, as well as other lenders, provided 100 percent of the financing for these construction-to-permanent loans.

In connection with this program, construction, loan, and closing documents were prepared. Among other construction-related documents prepared was the "Home Construction and Agreement Including Lot" and "CCI Homes Investor Addendum." See, e.g., Home Construction and Agreement Including Lot and CCI Homes Investor Addendum of Janis Stewart, attached hereto as Exhibit 4; see also Appraisal, attached hereto as Exhibit 5. In the case of Janis Stewart, the Home Construction and Agreement Including Lot reflects a purchase price of $333,000. See Exhibit 4 at 1. This purchase price was 90 percent of the estimated appraised value. See Exhibit 5 at 1 and 4. This purchase price included the builder's estimate of all costs associated with the sale of the lot and the construction of the home thereon, including closing costs and interest. Specifically, the Home Construction and Agreement Including Lot reflected a lot price of $77,500. Exhibit 4 at 1. With respect to closing costs, it provided as follows:

> **CLOSING COSTS.** Buyer agrees to pay the Purchase Price. Builder agrees to pay Closing Costs (including but not limited to, appraisal fees, credit reports, lender inspection fees, doc prep fees, recording fees, and city, county, and state taxes and stamps on the mortgage and deed), loan origination and/or discount points.

Id. at 2, ¶ 5. As for interest, the CCI Homes Investor Addendum provided:

> CCI Homes will be fully responsible for paying interest on the construction loan during the construction phase only. Upon completion of the home (and upon receipt of Certificate of Occupancy) interest payments on the loan become the responsibility of the Buyer.

Id. at 7. As the Home Construction and Agreement Including Lot and CCI Homes

Investor Addendum make clear, the builder/seller was responsible for paying all closing costs as well as interest during the construction phase of the process.

The loan documents included, but were not limited to, the "Mortgage Brokerage Business Contract and Addendum," the "Construction Loan Agreement (Residential)," a construction budget, and a "Borrower's Authorization of Closing Funds." See Mortgage Brokerage Business Contract attached hereto as Exhibit 6; Construction Budget attached hereto as Exhibit 7; Motion to Have Additional Coast Bank Borrowers Recognized As Crime Victims Pursuant to the Crime Victim's Rights Act at Doc. 19-3 and Doc. 19-4. In the case of Janis Stewart, she and AML entered into a Mortgage Brokerage Business Contract and Addendum, which set the mortgage brokerage fee at $6,660, which is equal to two percent of the loan amount/purchase price, and obligates the investor to pay such fee.[5] Exhibit 6 at 1, ¶ III. Stewart and Coast entered into the Construction Loan Agreement (Residential). See Doc. 19-3 at 1. The Construction Loan Agreement (Residential) addresses the payment of both closing costs, including the mortgage brokerage fee, and interest. See id. at 5, ¶ J1, and 7, ¶ P. Both provisions of the Construction Loan Agreement (Residential) indicate that it is the

[5] Note that the amount of the mortgage brokerage fee was disclosed to and agreed to by the borrower. Further, the amount – two percent of the loan amount/purchase price -- was within the market range of mortgage brokerage fees charged, especially for loans that carried greater risk, such as loans for investment properties, as opposed to loans for primary residences. In short, AML did not overcharge the borrowers.

There was nothing illegal about AML charging a brokerage fee of two points, as opposed to one point. The crime occurred when Miller used some of the mortgage brokerage fee to pay Coon and neither defendant disclosed the fact of the payments to Coast.

investor/borrower who is responsible for the payment of these amounts. However, as happened in the case of Janis Stewart, it is common for a builder or contractor to agree to assume responsibility for the payment of closing costs, including the mortgage brokerage fee, and interest and to incorporate said amounts into the purchase price/contract amount set by the builder or contractor. Similarly, it is common for a mortgage broker and/or lender to accept payment of these amounts from a builder or contractor on behalf of the borrower, provided, however, that if the builder or contractor fails to make the payments, the borrower retains ultimate responsibility for their payment. In short, the borrower is free to provide for the payment of these amounts to the mortgage broker and/or the lender by the builder or contractor via separate contract, and that is what happened in the case of Janis Stewart, who provided for the payment of these amounts by the builder via the Home Construction and Agreement Including Lot and CCI Homes Investor Addendum.

The construction budget itemizes, among other things, the estimated costs of the sale of the lot and construction of a home thereon as well as the builder's projected profit and overhead. See Exhibit 7. Among other items, the construction budget includes specific line items for the lot, drywall, and closing costs. Id. The builder prepared the construction budget for use by the lender in making construction disbursements. As the builder completes the activities itemized in the construction budget, the lender will disburse the itemized amounts, or a portion thereof. The Borrower's Authorization of Closing Funds authorizes both the lender and the title company to disburse certain amounts from the loan proceeds, including amounts owed to the builder for specific line items in the construction budget, such as the lot and

closing costs, because those activities are completed as of the closing. See Doc. 19-4.

While at first glance the Borrower's Authorization of Closing Funds makes it appear that the borrower is paying the closing costs, such is not the case. Rather, the borrower is paying a portion of the purchase price, and that portion of the purchase price due to the builder is being reduced by the amount of the closing costs because the builder agreed to pay them. Stated another way, the builder paid the closing costs, and the title company simply "netted out" the amounts owed to and due from the builder at closing. This is akin to a scenario wherein the builder appears at closing with a check to cover the amount of the closing costs, and then receives a check for that portion of the purchase price due to the builder at closing.

The fact that the builder paid the closing costs, including the mortgage brokerage fee, is also reflected in the closing documents. See Motion to Have Additional Coast Bank Borrowers Recognized As Crime Victims Pursuant to the Crime Victim's Rights Act at Doc. 19-5. The HUD 1 Settlement Statement sets out all of the closing costs (referred to as "settlement charges"), including the mortgage brokerage fee of $6,660 charged by AML. See Doc. 19-5 at 2, line 801. Further, the HUD 1 Settlement Statement shows that the "Gross Amount Due To Seller," which equals the fixed purchase price/loan amount, was reduced by the closing costs, the loan in progress ("LIP") account[6], and the cost of the lot[7]. See id. at 1, lines 420, 502, 506, 507, and 603;

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[6] See Doc. 19-4 (setting LIP account amount at $229,500.)

[7] Note that the actual cost of the lot, as reflected in the HUD 1 Settlement Statement, was less than the stated amount for the lot in the Home Construction and Agreement Including Lot. Compare Exhibit 4 at 1, line 507, with Doc. 19-5 at 1. This difference illustrates the point that the fixed purchase price was just that – fixed. The

see also Check # 59272 to AML in the amount of $6,660 attached hereto as Exhibit 8. More to the point, the builder paid that mortgage brokerage fee, not the investor/borrower.

The mortgage brokerage fee was a known amount and was or should have been taken into account by the builder in fashioning the closing costs line item in the construction budget. In any event, the fixed purchase price aspect of the program meant that the builder assumed the risk of any increase in the costs of materials, such as drywall, labor, closing costs, and other items. On the flip side, the builder stood to be rewarded if the builder was able to keep costs down. For example, if the builder was able to acquire drywall at a deep discount and, therefore, build a given house less expensively, the builder realized a greater profit because of the fixed purchase price. If, on the other hand, the builder encountered increased costs for drywall (or other items), the builder's profit was reduced because of the fixed purchase price. Thus, if the two points charged by AML had any impact, the impact was on the builder's profit, rather than on the fixed purchase price agreed to be paid by the investor/borrower.

The suggestion that AML's charging of a mortgage brokerage fee of two points, rather than one point, was the cause of the builder's failure to complete construction of homes -- let alone the cause of the builder's ultimate demise, the decline in Coast's stock price, the purchase of Coast by First Bank, and First Bank's institution of foreclosure actions and other collection efforts -- is a stretch at best. As noted, the mortgage brokerage fee was a known amount and was or should have been taken into

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purchase price remained unchanged despite changes in underlying costs.

account by the builder in fashioning the closing costs line item in the construction budget. In any event, the builder attributed its financial woes to a slow-down in the construction permitting process and the extra expenses generated by such delays.

The Borrowers Are Not Entitled To Portions Of Miller's PSR.

The borrowers seek access to portions of Miller's PSR regarding victim and restitution issues. (Doc. 17). This request should be denied on several grounds. First, this request is premature because the borrowers have not yet been declared "crime victims." Second, even if declared victims, the CVRA does not grant crime victims a right to obtain information contained in a PSR. See In re Kenna, 453 F.3d 1136, 1137 (9th Cir. 2006) (rejecting the argument that "§ 3371 of the CVRA confers a general right for crime victims to obtain disclosure of the PSR"); United States v. Ingrassia, 2005 WL 2875220 at *17 (E.D.N.Y. Sept. 7, 2005) (declining to recommend disclosure of a presentence report under the CVRA). Likewise, the CVRA does not provide a mechanism for crime victims to obtain discovery of information directly from the defendant. United States v. Sacane, 2007 WL 951666 (D. Conn. Mar. 28, 2007). Even if the Court were inclined to grant the borrowers' motion, they have failed to demonstrate that access to the PSR is necessary to aid them in describing the impact of the crime and/or for restitution calculation purposes. The borrowers state that they will seek restitution of the additional point plus interest charged on their loans. (Doc. 19 at 5). The pleadings filed by the borrowers reveal that access to their loan documents should provide sufficient information to calculate potential restitution. Third, routine disclosure of PSR information is prohibited by Middle District of Florida Local Rule 4.12. Likewise, under 18 U.S.C. § 3552(d) and Federal Rule of Criminal Procedure 32(e)(2),

PSRs are to be provided only to the defendant, the defendant's counsel, and the attorney for the Government.

CONCLUSION

For all of the foregoing reasons, the United States respectfully requests that the Court deny the above-referenced motions.

Respectfully submitted,

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U.S. v. JOHN ROBERT MILLER **Case No. 8:08-cr-330-T-30TBM**

CERTIFICATE OF SERVICE

I hereby certify that on December 5, 2008, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

Eduardo Suarez, Esquire
James E. Felman, Esquire
Marcelino J. Huerta, III, Esquire
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